(8)

Supreme Court, U.S.
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No. 00-6933

IN THE

Supreme Court of the United States

REMON LEE,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

BONNIE I. ROBIN-VERGEER
Counsel of Record
DAVID C. VLADECK
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

August 2001 — Counsel for Petitioner Remon Lee

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. MISSOURI SUPREME COURT RULES 24.09 AND 24.10 ARE NOT "ADEQUATE" TO BAR REVIEW OF LEE'S DUE PROCESS CLAIM. 1

A. The "Adequacy" Inquiry Is Designed to Protect Federal Constitutional Rights. 1

B. Missouri Supreme Court Rules 24.09 and 24.10 Have Not Been Regularly Enforced. 3

C. The State Has No Legitimate Interest in Applying Rules 24.09 and 24.10 Here. 5

II. EVEN IF LEE'S DUE PROCESS CLAIM IS PROCEDURALLY BARRED, HE HAS SHOWN "CAUSE" AND "PREJUDICE" OR, IN THE ALTERNATIVE, "ACTUAL INNOCENCE." 11

A. "Cause" and "Prejudice" 11

1. Cause 11

2. Prejudice 16

B. Actual Innocence 18

III. THE TRIAL COURT DENIED LEE DUE PROCESS, AND 28 U.S.C. § 2254(d) DOES NOT LIMIT HIS ACCESS TO HABEAS RELIEF 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barr v. City of Columbia, 378 U.S. 146 (1964) 3

Brady v. Maryland, 373 U.S. 83 (1963) 14, 16, 20

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 6

Brown v. Western Railway, 338 U.S. 294 (1949) 2

Caldwell v. Mississippi, 472 U.S. 320 (1985) 4

Chambers v. Mississippi, 410 U.S. 284 (1973) 20

Chapman v. California, 386 U.S. 18 (1967) 19

Crane v. Kentucky, 476 U.S. 683 (1986) 20

Davis v. Wechsler, 263 U.S. 22 (1923) 2

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 20

Edwards v. Carpenter, 529 U.S. 446 (2000) 14

Ford v. Georgia, 498 U.S. 411 (1991) 6, 7

Harris v. Nelson, 394 U.S. 286 (1969) 20

Harris v. Reed, 489 U.S. 255 (1989) 4, 16

Hensley v. Municipal Court, 411 U.S. 345 (1973) 20

James v. Kentucky, 466 U.S. 341 (1984) 2, 6

Michel v. Louisiana, 350 U.S. 91 (1955) 6

Murray v. Carrier, 477 U.S. 478 (1986) 12, 14

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 11

Ortega-Rodriguez v. United States,
507 U.S. 234 (1993) 10

Osborne v. Ohio, 495 U.S. 103 (1990) 7, 9

Reece v. Georgia, 350 U.S. 85 (1955) 6

Sawyer v. Whitley, 505 U.S. 333 (1992) 16

Schlup v. Delo, 513 U.S. 298 (1995) 16, 18

Strickland v. Washington, 466 U.S. 668 (1984) 16

Strickler v. Greene, 527 U.S. 263 (1999) 16, 17

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 6

Taylor v. Illinois, 484 U.S. 400 (1988) 8

Trevino v. Texas, 503 U.S. 562 (1992) 11

Ungar v. Sarafite, 376 U.S. 575 (1964) 3

United States v. Bagley, 473 U.S. 667 (1985) 16

Washington v. Texas, 388 U.S. 14 (1967) 20

Williams v. Taylor, 529 U.S. 362 (2000) 19, 20

STATE CASES

Anderson v. Anderson, 669 S.W.2d 624 (Mo. Ct.
App. 1984) 4

Buck v. Missouri, No. ED75218, 2000 WL 754367
(Mo. Ct. App. June 13, 2000) 14

DeClue v. Missouri, 579 S.W.2d 158 (Mo. Ct.
App. 1979) 14

Kern v. Missouri, 507 S.W.2d 8 (Mo. 1974) 14

Missouri v. Arndt, 881 S.W.2d 634 (Mo. Ct.
App. 1994) 14

Missouri v. Blake, 620 S.W.2d 359 (Mo. 1981) 5

Missouri v. Childers, 852 S.W.2d 390 (Mo. Ct.
App. 1993) 4

Missouri v. Cuckovich, 485 S.W.2d 16 (Mo. 1972) 4

Missouri v. Freeman, 702 S.W.2d 869 (Mo. Ct.
App. 1985) 4

Missouri v. Goodman, 531 S.W.2d 777 (Mo. Ct.
App. 1975) 3

Missouri v. Kelley, 953 S.W.2d 73 (Mo. Ct.
App. 1997) 14

Missouri v. Larner, 844 S.W.2d 490 (Mo. Ct.
App. 1992) 14

Missouri v. Martin, 525 S.W.2d 804 (Mo. Ct.
App. 1975) 3

Missouri v. McIntosh, 673 S.W.2d 53 (Mo. Ct. App. 1984) 5

Missouri v. Minnix, 503 S.W.2d 70 (Mo. Ct. App. 1973) 5

Missouri v. Perkins, 710 S.W.2d 889 (Mo. Ct. App. 1986) 5

Missouri v. Ray, 600 S.W.2d 70 (Mo. Ct. App. 1980) 15

Missouri v. Roberts, 506 S.W.2d 817 (Mo. Ct. App. 1974) 3

Missouri v. Scott, 487 S.W.2d 528 (Mo. 1972) 4

Missouri v. Settle, 670 S.W.2d 7 (Mo. Ct. App. 1984) 4

Missouri v. Shryock, 593 S.W.2d 906 (Mo. Ct. App. 1980) 3

Missouri v. Varner, 837 S.W.2d 44 (Mo. Ct. App. 1992) 5

Missouri v. Whitfield, 837 S.W.2d 503 (Mo. 1992) 4

Ray v. Missouri, 644 S.W.2d 663 (Mo. Ct. App. 1982) 14, 15

CONSTITUTION AND FEDERAL STATUTES

U.S. Const. Amend. XIV, Due Process Clause ..... *passim*

28 U.S.C. § 2254(d) 18, 19

MISSOURI SUPREME COURT RULES

Missouri Supreme Court Rule 24.09 (1994) ..... *passim*

Missouri Supreme Court Rule 24.10 (1994) ..... *passim*

Missouri Supreme Court Rule 25.05(A)(5) (1994) 9

Missouri Supreme Court Rule 25.08 (1979) 3

Missouri Supreme Court Rule 29.15 (1994) 12, 13, 14, 15

MISCELLANEOUS

Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* (4th ed. 1996) 6

Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128 (1986) 2

Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 11

Rob Warden, Center on Wrongful Convictions, Northwestern University School of Law, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* (May 2, 2001) 17

INTRODUCTION

This case is a testament to the degree to which, in the words of the dissent below, the Great Writ has become "a cascading web of confounding and labyrinthine procedural obstacles" that "has now virtually obscured the core purpose of the Writ." J.A. 253 (Bennett, C.J., dissenting). Alleging one procedural default after another, the state attempts to complicate a petition for habeas relief based on a striking, yet straightforward, denial of due process: the Missouri trial judge's refusal, because of his personal schedule, to grant a few hours' recess so that Remon Lee could locate his alibi witnesses, or to authorize court process to compel the appearance of these subpoenaed witnesses.

Although the state now suggests a raft of new—and we believe, meritless—procedural obstacles, both the Missouri Court of Appeals and the state in its Brief in Opposition in this Court relied on a single procedural default as grounds for rejecting Lee's due process claim: Lee's alleged failure to comply with Missouri Supreme Court Rules 24.09 and 24.10 in moving for a continuance. The absence of technical compliance with these rules is the only alleged procedural defect that may properly be considered at this stage, and this purported defect should be rejected under existing precedent because of the inadequacy of the state-law grounds.

I. MISSOURI SUPREME COURT RULES 24.09 AND 24.10 ARE NOT "ADEQUATE" TO BAR REVIEW OF LEE'S DUE PROCESS CLAIM.

A. The "Adequacy" Inquiry Is Designed to Protect Federal Constitutional Rights.

The state argues that the "adequacy" element of the doctrine "has served *only* the purpose of exposing subterfuges designed to frustrate federal review." Resp. Br. 10 (emphasis added). According to the state, the various tests this Court has formulated to determine the adequacy of asserted state-law grounds have been designed for the single purpose of ferreting

out rulings made in bad faith by state courts to frustrate the adjudication of federal claims. *Id.* at 19, 20, 34.

That is not so. This Court's decisions finding state-law procedural grounds inadequate do not turn upon a finding of subterfuge; indeed, such second-guessing of the motives of state-court judges in particular cases is neither feasible nor desirable. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1161 (1986) (observing that determining whether a state-court procedural ruling is intended to evade a federal claim "poses obvious difficulties" and that "Supreme Court decisions do not purport to find evasion when holding state grounds inadequate"). Of course, principled tests established by this Court for determining when a state-law ground is adequate help root out those procedural grounds for decision that are little more than "legal fictions," Resp. Br. 19, but the adequacy element of the test serves additional important purposes. Chief among these is that of protecting federal rights.

This Court has long expressed wariness of state procedural rules that, whether or not applied in good faith, "prevent implementation of federal constitutional rights," *James v. Kentucky*, 466 U.S. 341, 348-49 (1984), or undermine this Court's ability to maintain uniformity in the interpretation of federal rights and claims. *See, e.g., Brown v. Western Ry.*, 338 U.S. 294, 299 (1949) ("Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."); *Davis v. Wechsler*, 263 U.S. 22, 25 (1923) (emphasizing that "local practice shall not be allowed to put unreasonable obstacles in the way" of the enforcement of constitutional norms). Indeed, as even the state's amicus concedes: "Conscious hostility is not the only danger to federal rights . . . . Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case." Criminal Justice Legal Foundation Br. 11. The Missouri courts applied

Rules 24.09 and 24.10 in precisely such an unfair manner here.

B. Missouri Supreme Court Rules 24.09 and 24.10 Have Not Been Regularly Enforced.

The state does not dispute that Missouri courts often reach the merits in reviewing denials of procedurally defective motions for continuances. *See* Pet. Br. 31-33 & nn. 12-13 (citing cases).[1] It argues nonetheless that a state procedural ground cannot be found to be inadequate for inconsistent application in the absence of decisions in which the state courts have reversed on the merits, despite the default. Resp. Br. 11, 24, 26. This argument fundamentally misunderstands the "firmly established and regularly followed" inquiry. There are myriad reasons why a state court considering a denial of a continuance may not find a state-law abuse of discretion or denial of federal due process rights, none of which has anything to do with enforcing state procedural rules governing the manner in which the motion must be made. Cases in which a denial of a continuance rises to the level of reversible error or a due process violation are relatively infrequent. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("[I]t is not every denial of a request for more time that violates due process . . . .").

Indeed, this Court's cases confirm the irrelevance to the adequacy inquiry of the actual *outcome* of state-court decisions that ignore procedural defaults. In *Barr v. City of Columbia*, 378 U.S. 146, 149 & n.4 (1964), for example, this Court found that South Carolina's rule regarding the adequacy of exceptions made below was not "strictly or regularly followed" in part because in three previous cases, the state courts had considered "these same exceptions enough to raise the question of

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[1] The state argues that these rules have been established "for decades." Resp. Br. 25. In fact, the Missouri courts routinely overlooked failures to comply with Rule 25.08, the predecessor to Rules 24.09 and 24.10, as well. *See, e.g., Missouri v. Shryock*, 593 S.W.2d 906, 908 (Mo. Ct. App. 1980); *Missouri v. Goodman*, 531 S.W.2d 777, 779 (Mo. Ct. App. 1975); *Missouri v. Martin*, 525 S.W.2d 804, 808 (Mo. Ct. App. 1975); *Missouri v. Roberts*, 506 S.W.2d 817, 818 (Mo. Ct. App. 1974).

sufficiency of evidence," even though two of these cases nonetheless affirmed the convictions. Similarly, in *Caldwell v. Mississippi*, 472 U.S. 320, 328 (1985), this Court cited a previous Mississippi decision that had explicitly *rejected* a defendant's claims on the merits rather than rely on a procedural bar, as evidence of the lack of a similar procedural default in Caldwell's own case. *See also Harris v. Reed*, 489 U.S. 255, 278-79 (1989) (Kennedy, J., dissenting) (noting that *Caldwell* recognized that "Mississippi had not consistently applied its procedural bar to capital cases").

In any event, Missouri courts have reversed denials of continuances when the motions were procedurally defective—typically in circumstances, such as these, where the need for the continuance was based on surprise or a lack of opportunity to present a claim to the trial court.[2] *See, e.g., Missouri v. Whitfield*, 837 S.W.2d 503, 508 (Mo. 1992) (reversing trial court's failure to grant apparently oral request for a continuance to examine a coat after its "surprise introduction" at trial); *Missouri v. Childers*, 852 S.W.2d 390, 391-92 (Mo. Ct. App. 1993) (reversing denial of apparently oral continuance request after late production of discovery by the prosecution); *see also Anderson v. Anderson*, 669 S.W.2d

[2] None of the Missouri cases the state cites at Resp. Br. 25-26 involved subpoenaed witnesses who vanished immediately before they were testify, rendering technical compliance with the procedural rules governing continuance impracticable. Indeed, several involved witnesses who were not subpoenaed or whose absence was known for days before trial. *See, e.g., Missouri v. Scott*, 487 S.W.2d 528, 530 (Mo. 1972) (missing witness had not been subpoenaed); *Missouri v. Settle*, 670 S.W.2d 7, 13 (Mo. Ct. App. 1984) (defective motion for continuance filed six days before trial). In general, motions for continuances made on the eve, or even the morning, of trial can be prepared in compliance with Rules 24.09 and 24.10. Thus, for example, the fact that the defendants prepared defective written motions for continuances in *Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972), and *Missouri v. Freeman*, 702 S.W.2d 869, 873-74 (Mo. Ct. App. 1985), shows that they had the opportunity to prepare motions that would have complied with the procedural rules. At any rate, the fact remains that the Missouri courts have been erratic in their enforcement of these rules.

624, 625 (Mo. Ct. App. 1984) (per curiam) (reversing denial of oral motion for a continuance in a civil case because appellant "had had very little opportunity to get an attorney who could even present his application for continuance in the regular way prescribed by Supreme Court Rule 65.03" [the civil analog to Rule 24.09]); *Missouri v. Minnix*, 503 S.W.2d 70, 72-74 (Mo. Ct. App. 1973) (reversing denial of oral motion for a continuance on morning of trial to allow counsel time to file a formal motion regarding the defendant's mental capacity).[3]

C. The State Has No Legitimate Interest in Applying Rules 24.09 and 24.10 Here.

The state's defense of Lee's purported procedural default is based on the untenable proposition that when defense counsel discovered after the lunch recess that Lee's alibi witnesses had suddenly vanished, he was required not only to make a written motion for a continuance with an affidavit, but to inform the trial court as to precisely where the witnesses had gone and when they would be available—even though he was allowed no time to make any inquiry. The state attempts to recast Lee's argument that the rules are inadequate as one that would require a "radical change of direction" in the independent and adequate state ground doctrine. Resp. Br. 10; *see also id.* at 32-34. Again, this is not so. Lee does not contend that this Court must engage in ad hoc balancing of the state's interests against countervailing federal interests in order to determine whether Rules 24.09 and 24.10 are adequate. Rather, Lee argues on the basis of existing precedents that the circumstances of the particular case bear on whether a state's procedural rule serves a legitimate purpose. Here, no

[3] For additional cases in which the Missouri appellate courts reversed denials of what were apparently oral requests for continuances, where the last-minute disclosure of evidence by the state unfairly surprised the defense, see *Missouri v. Blake*, 620 S.W.2d 359, 360-61 (Mo. 1981); *Missouri v. Varner*, 837 S.W.2d 44, 45-46 (Mo. Ct. App. 1992); *Missouri v. Perkins*, 710 S.W.2d 889, 891-94 (Mo. Ct. App. 1986); *Missouri v. McIntosh*, 673 S.W.2d 53, 54-55 (Mo. Ct. App. 1984).

legitimate state interest is served by finding that Lee defaulted his due process claim when he substantially complied with both rules in circumstances in which literal compliance was unrealistic, if not impossible.

This Court's cases regarding the adequacy of purported state procedural grounds are not so rigid and unforgiving as the state suggests. On a number of occasions, this Court has found that a state rule or procedure "would further no perceivable state interest," *James*, 466 U.S. at 349, without deciding whether that rule or procedure would *always* be inadequate. As the Court recognized in *Michel v. Louisiana*, 350 U.S. 91 (1955), although a procedure "on its face" may be legitimate, *id.* at 93, "in the circumstances of a particular case, the application of such a rule may not give a reasonable opportunity to raise the federal question." *Id.* at 95; *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 245 (1969) (Harlan, J., dissenting) (state procedural ground inadequate because, "although [the rule] itself may not be novel, the standard implicitly governing the rule's application to the facts here was"); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930); Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 577 (4th ed. 1996) ("Supreme Court review plainly cannot be foreclosed by a litigant's noncompliance with a state procedural rule that, on its face or as applied, violates the Due Process Clause."). In such circumstances, this Court has recognized, the state's interest "must bow to essential considerations of fairness to individual defendants." *Michel*, 350 U.S. at 98; *accord Reece v. Georgia*, 350 U.S. 85, 89 (1955) (state rule regarding the timing of objections to a grand jury was inadequate where it was "utterly unrealistic" to say that the defendant had an opportunity to object).

Thus, in *Ford v. Georgia*, 498 U.S. 411 (1991), the Court acknowledged that Georgia's requirement that a *Batson* claim be raised between the selection of jurors and the administration of their oaths was "a sensible rule," *id.* at 422, but nonetheless analyzed whether the rule was adequate to bar the claim "in

this case." *Id.* at 423. Similarly, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court had no quarrel with Ohio's rule that a defendant must preserve challenges to jury instructions by objecting to them when given. *See id.* at 123. Despite the defendant's failure to object to the absence of a lewdness instruction and thus to "follow[] the precise procedure" required, *id.* at 125, this Court nevertheless held that it could consider his constitutional claim. The Court noted that the trial was "brief," that the defense had moved to dismiss the case before trial, and that "*under the circumstances*, nothing would be gained by requiring [the defendant's] lawyer to object a second time, specifically to the jury instructions." *Id.* at 124 (emphasis added).

Likewise, "nothing would be gained" by requiring Lee to file a written motion with an affidavit, as required by Rule 24.09, or to make a more extensive proffer regarding the witnesses' absence, under Rule 24.10. *See* Pet. Br. 37-38 (arguing that Lee satisfied each element required under Rule 24.10). What is remarkable about the position of the state is how far it strays from the realities of the situation. Lee was to present his alibi witnesses after the lunch recess on Thursday, February 24, the last day of trial. The afternoon session resumed, and Lee's counsel immediately put his client on the stand to make a record regarding the alibi witnesses' sudden disappearance from the witness room where they had waited all morning. J.A. 15-22. After the trial court denied the motion, closing arguments were made to the jury, the case was submitted, and the jury delivered its verdict—all that same afternoon. There was no opportunity for Lee to file a written motion with an affidavit (although testimony by a defendant in open court under oath and subject to cross-examination is surely a superior form of proof to an affidavit signed by the defendant or his counsel).

Counsel requested an overnight continuance to attempt to locate the witnesses, J.A. 20; Lee personally asked for only a couple hours' recess. J.A. 18. The trial court allowed no time at all to attempt to locate the witnesses; to determine where,

when, or why they had left; to prepare a written (and better informed) motion for a continuance; or to use any court process whatsoever to bring the witnesses to the courthouse—despite the fact that these witnesses were under subpoena. J.A. 18, 20-21. The testimony of Lee and the representations of counsel, an officer of the court, amply establish that the witnesses were absent without Lee's consent. *See* Rule 24.10(d). Counsel asked the trial court for "capiases" for the witnesses, but the court again refused. J.A. 18, 20. Yet this Court's cases "establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (citation omitted).

The state faults Lee for failing to provide "an assurance" that the witnesses would be at the address that counsel provided to the trial court. J.A. 20; *see* Resp. Br. 31. But that is not the test for enforcement of a subpoena; nor can a defendant be expected to provide an absolute guarantee under Rule 24.10 that a missing witness will be located at a particular time and place. Obviously, the defense could do no more than represent to the court where Lee's witnesses were staying and that there were reasonable grounds for believing that they could readily be located, as required by Rule 24.10(b), because they planned to remain in the city for a religious event. J.A. 18. If Lee had been able to supply a written motion with an affidavit at that moment, it could have said nothing more.

The state also claims, *see* Resp. Br. 36, that Lee failed to demonstrate either the materiality of, or the particular facts that would be established by, the witnesses' testimony, as required by Rule 24.10(a) and (c), because he did not repeat at length the detailed explanation of the alibi witnesses' expected testimony that he had provided in his opening statement and during voir dire, J.A. 10-13, although Lee reminded the trial court that the missing witnesses were his family members from California. J.A. 16. The state posits an uninformed and

mystified trial court struggling to remember "the required information by review of the entire record," an enterprise it deemed "questionable at best." Resp. Br. 31; *see also id.* at 14.

The state's argument is disingenuous. This was not a months' long antitrust case, but a short trial in which the *only* issue was whether the eyewitnesses had correctly identified Lee as the driver of the get-away truck, or whether, instead, he was in California at the time. The presentation of evidence took little more than one day, from February 23 to 24. The defense opening statement, which outlined the expected testimony of the alibi witnesses, was given on Wednesday, February 23, *one* day before the witnesses' disappearance. J.A. 12-13; *cf. Osborne*, 495 U.S. at 123 (constitutional challenge to jury instruction preserved by pre-trial motion in part because defendant's "trial was brief"). Rule 25.05(A)(5) requires that, upon request, the defense provide the state notice of its intent to offer an alibi defense. That notice evidently was provided because the prosecutor discussed the anticipated alibi defense in her opening statement. Tr. 187. The prosecutor obviously appreciated the witnesses' significance, as she took pains to exploit their absence in her closing argument. J.A. 27. In short, there was no question who these witnesses were or why they were important: They were Lee's entire defense.

Nor is it true that "we do not know precisely what facts the trial court considered" when it denied the continuance. Resp. Br. 13. The trial court spelled out its reasons for rejecting the motion for the record. The first thing the trial judge said after counsel proposed a continuance until the next morning was this: "Friday. And my daughter is going to be in the hospital all day. . . . So I've got to stay with her." J.A. 20. The first thing the trial judge said after counsel proposed Monday as an alternative was this: "I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances." J.A. 22. These are not even remotely defensible reasons for denying a defendant a chance to rebut a first-degree murder charge.

It is particularly anomalous to find a procedural default in

these circumstances when Rules 24.09 and 24.10 were designed *not* to protect the integrity of the appellate process, but, as the state put it, "to enhance the reliability of a *trial court's* determination" of whether to delay a trial because of the absence of a witness. Resp. Br. 29 (emphasis added); *cf. Ortega-Rodriguez v. United States*, 507 U.S. 234, 246 (1993) (holding it improper for the court of appeals to sanction a defendant by dismissing his appeal when his transgression flouted only the authority of the district court, which "has the authority to defend its own dignity," and had "no connection" to the appellate process). Here the trial court denied the motion *on the merits*; the court never suggested that the motion was defective in form or that the court lacked sufficient information about the importance of the witnesses' testimony. And the prosecutor neither objected to the requested continuance itself or the form of the motion, nor chose to cross-examine Lee. The state did not even argue in its brief on appeal that Lee had failed to comply with Rule 24.09. J.A. 110-15. This sequence of events suggests that it was the state, not the defense, that engaged in sandbagging by waiting until the appeal to suggest that Lee's motion for continuance was procedurally deficient.

Apparently recognizing that withholding a reasonable opportunity to comply with Rules 24.09 and 24.10 would itself deny Lee due process, the state is reduced to arguing that Lee's counsel could have written out a motion for a continuance and an affidavit in longhand in the courtroom. Resp. Br. 30, 36. It is difficult to see when or how counsel could have done even that much, for as soon as the afternoon session commenced, he was before the trial court arguing for a continuance. The likelihood that the trial court would have granted counsel a brief continuance to write out a motion and affidavit on a legal pad, when the court would not allow the defense a continuance to attempt to track down its witnesses, is surely remote. The trial was concluded that same day, leaving counsel no opportunity to prepare a written motion, or any reason for doing so. And even if counsel could have scribbled out a motion and affidavit in longhand (leaving aside the question of

notarization), what purpose would that have served? A handwritten motion in such circumstances would have been perfunctory at best, certainly offering the trial court nothing more than what was conveyed orally. This Court has frowned on such pointless exaltations of form over substance. *See* Pet. Br. 39-40 & n.16 (citing examples).

In sum, Rules 24.09 and 24.10 are inadequate to preclude consideration of Lee's due process claim, and the case should be remanded for consideration of that claim.[4]

II. EVEN IF LEE'S DUE PROCESS CLAIM IS PROCEDURALLY BARRED, HE HAS SHOWN "CAUSE" AND "PREJUDICE" OR, IN THE ALTERNATIVE, "ACTUAL INNOCENCE."

A. "Cause" and "Prejudice"

1. Cause. The state contends that despite the exceptional circumstances that led to Lee's failure to comply with one or both of Rules 24.09 and 24.10, Lee cannot show "cause" for any procedural default. Its strenuous resistance to a finding of "cause" is ironic because it acknowledges that the "cause and prejudice" exception is available as a backstop "to prevent a miscarriage of justice in the extraordinary case." Resp. Br. 33. This is such a case.

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[4] In two footnotes, Resp. Br. 16 n.2, 32 n.7, the state contends that Lee did not fairly present his federal due process claim to the Missouri courts. The state did not make this argument in either its Brief in Opposition or even in its brief on appeal to the Eighth Circuit; the argument is therefore waived. *See* Supreme Ct. R. 15.2; *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985); Robert L. Stern et al., *Supreme Court Practice* § 6.37, at 370 (7th ed. 1993). The point, in any case, is meritless. Lee explicitly argued on direct appeal that the trial court's denial of a continuance deprived him of his rights to due process of law and present witnesses in his defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. J.A. 87, 90; *see also* J.A. 91, 92, 94, 95. Without question, this issue, which was preserved in the motion for new trial, *see* J.A. 31-32, was fairly presented to the Missouri Court of Appeals. *See Trevino v. Texas*, 503 U.S. 562, 567 (1992) (per curiam).

First, the state misses the point when it argues that the alibi witnesses' disappearance gave rise to the need for the continuance, but was not "cause" for any procedural default. Resp. Br. 36. The existence of cause turns on whether "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In this instance, the *suddenness* of the witnesses' departure both generated the need for the continuance *and* impeded counsel's ability to comply literally with Rules 24.09 and 24.10. As for *why* the witnesses left, Lee agrees with the state, Resp. Br. 37, 49, that whether a court officer, employee of the prosecutor's office, or any other agent of the state told the witnesses they could leave adds nothing in terms of causation to this impediment to full compliance with the rules: It was the witnesses' disappearance *without warning* that proximately caused any failure to comply with the rules. The key point is that Lee is blameless for the witnesses' disappearance—whatever the reason for their departure.

The state does not accept Lee's contention that the witnesses left for reasons external to the defense, however; it insinuates that his family members left not because of what a state official told them, but because they did not want to perjure themselves on Lee's behalf. Resp. Br. 37. Nothing in the record bears out this invention by the state. The state cites inconsequential inconsistencies between Lee's amended motion for postconviction relief and the affidavits submitted with his federal habeas petition in an effort to suggest that Lee's explanation for his witnesses' disappearance is not believable. Resp. Br. 6-7, 38 & n.9. It is unimportant that in his amended Rule 29.15 motion Lee refers to "an unknown person," believed to be employed by the prosecutor's office, who told the witnesses they could leave, J.A. 56, 58, whereas in their federal affidavits, Minister James and Gladys Edwards refer to that person as an "officer of the court." J.A. 172, 174. Nor is it significant that Lee's pro se federal habeas petition assumes that the court official did so at the behest of a

prosecutor bent on tricking the witnesses, J.A. 155-56, whereas the amended Rule 29.15 motion makes no judgment as to whether the official acted in good faith or bad. J.A. 56-58. The difference in "spin" reflects only the difference between counseled and uncounseled pleadings.[5]

The core allegation—that a state official, whom Lee cannot identify, told the witnesses that they could leave because their testimony was not needed at that time—has remained unchanged. Minister Edwards's sworn explanation seems by far the more plausible account: "[W]e were told by an officer of the court that [o]ur testimony would not be needed until the following day, we were excused until then. We *did not travel from California to abandon the boy*, we came to testify." J.A. 174. Because Lee requested, but was wrongly denied, the opportunity to develop this claim in state court, he is now entitled to an evidentiary hearing in federal court to establish the reason for his witnesses' disappearance. *See* Pet. Br. 26-29, 43.[6]

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[5] It also means nothing that the state rested its case at 10 a.m., while counsel estimated that the witnesses left the courthouse at 11 a.m. *See* Resp. Br. 7. Defense counsel did not actually know when the witnesses left. But even if they left at 11 a.m., that does not mean their departure was not the result of a representation by a state official. The official could have talked to the witnesses before the state rested, there could have been a misunderstanding regarding the status of proceedings, or the official could have acted in bad faith. Because the witnesses were barred from the courtroom, there is no reason that *they* would have known when the state rested its case.

[6] Although one question presented in the Petition for Certiorari concerned whether an evidentiary hearing should be held to consider the alibi witnesses' contention that they were told by a court official to leave, the state waited until its merits brief to suggest that this question is not properly before the Court because the issue is outside the scope of the Eighth Circuit's certificate of appealability. Resp. Br. 47-48. The argument is waived for failure to include it in the state's Brief in Opposition filed in this Court. *See* note 4, *supra*. In any case, the point is meritless because the question of why the witnesses left is intertwined with the due process issue on which the Eighth Circuit granted the certificate.

Second, the state maintains that Lee defaulted this claim (whether considered as an additional constitutional claim or as "cause") by offering an explanation for his witnesses' disappearance at the postconviction stage, rather than in his motion for new trial. Resp. Br. 2, 37-39. With the exception of claims of ineffective assistance of counsel, *see Edwards v. Carpenter*, 529 U.S. 446 (2000), this Court has never held that "cause"—the existence of which presents a question of federal law, *Carrier*, 477 U.S. at 489—must be exhausted in state court. More importantly, the state does not deny that Lee presented the claim to the postconviction motion court, but argues instead that the claim was not cognizable at the postconviction stage. Resp. Br. 38. The argument is yet another groundless procedural snare the state attempts to set for Lee. It was entirely appropriate under Missouri law for Lee to allege at the postconviction stage that the state had interfered with his witnesses, a claim based on facts outside the four corners of the trial transcript. The state cites no authority that would have required Lee to raise such a claim in a motion for new trial and then in the direct appeal portion of his consolidated brief on appeal.

In fact, the weight of authority suggests that this type of claim is properly raised in a Rule 29.15 motion. The closest analogies to a due process claim based on state interference with the defense are claims that the prosecution suborned perjury or withheld exculpatory evidence subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963). Such claims are routinely considered in Missouri at the postconviction stage. *See, e.g., Kern v. Missouri*, 507 S.W.2d 8, 12-13 (Mo. 1974); *Buck v. Missouri*, No. ED75218, 2000 WL 754367 (Mo. Ct. App. June 13, 2000); *Missouri v. Kelley*, 953 S.W.2d 73, 91-93 (Mo. Ct. App. 1997); *Missouri v. Arndt*, 881 S.W.2d 634, 637-38 (Mo. Ct. App. 1994); *Missouri v. Larner*, 844 S.W.2d 490, 493 (Mo. Ct. App. 1992); *DeClue v. Missouri*, 579 S.W.2d 158, 159 (Mo. Ct. App. 1979). Indeed, in *Ray v. Missouri*, 644 S.W.2d 663 (Mo. Ct. App. 1982), the Missouri court reversed the denial of an evidentiary hearing at the

postconviction stage where the defendant had alleged that the state suborned perjury—despite the fact that the court had previously refused to hear the same claim on direct appeal because the matter had not been presented in the motion for new trial. *Id.* at 666 n.3; *see also Missouri v. Ray*, 600 S.W.2d 70, 74-75 (Mo. Ct. App. 1980) (direct appeal).

Finally, the state, which understood that Lee was advancing a due process claim in his Rule 29.15 motion based on the alleged state interference with his witnesses, *see* App. C, at 11a ¶ 2, did not then argue that the claim was not cognizable because it should have been presented in the motion for new trial. *See* App. C, at 12a-13a. Furthermore, neither the postconviction court nor the Missouri Court of Appeals found a procedural default in Lee's presentation of this claim. Nonetheless, the state claims that the postconviction court agreed that Lee's claim based on the state's alleged interference with his witnesses was not cognizable because it should have been raised on direct appeal. Resp. Br. 38. Not only had Lee's direct appeal, which was consolidated with his postconviction appeal, not yet been filed, but, more importantly, in paragraph 4 on J.A. 70, to which the state refers, the postconviction court was addressing only Lee's claim that he was denied due process when the trial court denied him a continuance. *That* claim, which Lee raised in his motion for new trial and on direct appeal, *see* note 4, *supra*, was indeed based on trial error, and so the postconviction court did not address it. As indicated in paragraph 3 on J.A. 69-70, however, the postconviction court rejected *on the merits* Lee's claim regarding the state's interference with Lee's witnesses—a claim that was not based on trial error—and refused to hold an evidentiary hearing. J.A. 75. Likewise, the Missouri Court of Appeals found no procedural default regarding the manner in which Lee requested an evidentiary hearing or any deficiency in the motion for new trial, but affirmed the denial of a hearing on the merits. J.A. 131. There can be no procedural default for purposes of federal habeas review, unless "the state court . . . actually . . . relied on the

procedural bar as an independent basis for its disposition of the case." *Harris,* 489 U.S. at 261-62 (citation omitted).

2. Prejudice. Arguing again for a change in the law, the state urges this Court to adopt a new standard for actual prejudice that is more stringent than any standard this Court has previously imposed; it then contends that Lee cannot meet this as-yet unarticulated standard because family members serving as alibi witnesses stand no chance of persuading a jury of Lee's innocence when stacked up against eyewitness testimony. In a first-degree murder case in which the state's proof of guilt is just barely legally sufficient and the defendant has been deprived of his right to present a defense, the selection of a standard for prejudice is unlikely to be dispositive. Nevertheless, this Court's precedents establish that the proper standard for actual prejudice where there has been a procedural default is no higher than that of materiality for *Brady* violations, *see United States v. Bagley,* 473 U.S. 667, 682 (1985), or prejudice for purposes of establishing ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 694 (1984)—that "there is a reasonable probability" that but for the error, "the result of the proceeding would have been different." *See Strickler v. Greene,* 527 U.S. 263, 282 (1999) (equating the actual prejudice and *Brady* materiality standards); *accord id.* at 297 n.2 (Souter, J., dissenting); *Schlup v. Delo,* 513 U.S. 298, 327 & n.45 (1995); *Sawyer v. Whitley,* 505 U.S. 333, 345 (1992). Lee plainly meets this standard. *See* Pet. Br. 43-45.

In essence, the state asks this Court to presume that eyewitness testimony, no matter how flawed, is inherently more worthy of credence than that of family members offering an alibi. That assumption flies in the face of the burgeoning literature regarding the unreliability of eyewitness testimony. As one recent study of 86 persons legally exonerated after being sentenced to death concludes: "Erroneous eyewitness testimony—whether offered in good faith or perjured—no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system." Rob Warden, Center on

Wrongful Convictions, Northwestern University School of Law, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* (May 2, 2001), *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/eyewitnessstudy.htm; *see also* Pet. Br. 44 & n.17. When a defendant attempts to establish a mistaken eyewitness identification, he is forced to prove a negative. A defendant typically does so by attacking the accuracy of the identification and showing that he was somewhere else at the time of the crime. Invariably, alibi testimony will be provided by those who know the defendant: his friends and family.

That the jury may still have chosen to believe the state's eyewitnesses if Lee had presented his alibi defense, does not negate Lee's showing of prejudice. There will always be a possibility of conviction if the state's case is legally sufficient. The test is "not whether the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler,* 527 U.S. at 289-90 (citation omitted). Lee need show only a "reasonable probability," or, to put it another way, a "significant possibility," *id.* at 297 (Souter, J., dissenting), that the outcome would have been different with his alibi testimony. His evidence, if presented, would have thrown the outcome of the case in doubt; hence, the verdict merits no confidence at all.

Finally, the trial court's denial of a continuance was prejudicial not only because it deprived Lee of his fundamental right to present a defense, but because it transformed the witnesses' sudden disappearance into affirmative evidence of guilt for the prosecution, irreparably tainting the trial. The prosecution capitalized on its windfall by arguing in closing to the jury that the failure of the promised alibi defense to materialize demonstrated that Lee was in Kansas City at the time of the crime. J.A. 27. The defense, by contrast, given no time by the trial court to investigate, could do nothing more than apologize awkwardly to the jury for failing to keep its

promise to put on an alibi defense. J.A. 26. The jury's conclusion that the eyewitnesses had identified the right man after all was a foregone conclusion. Even if the standard for prejudice were higher, Lee would meet it.

B. Actual Innocence

The state asserts that Lee cannot show actual innocence, as an alternative to cause and prejudice, first, because the alibi testimony was not "new," and second, because the jury could have chosen to believe the state's witnesses over Lee's alibi witnesses, had the latter testified. Resp. Br. 42-44.

Lee addressed the first argument in his opening brief. Pet. Br. 46-49. As for the second, that the jury *could* choose to accept the word of the state's eyewitnesses over the word of Lee's family members does not undermine Lee's showing of actual innocence, any more than it negates his showing of prejudice. The *Schlup* standard for actual innocence does not turn on whether the state's evidence, if credited, is sufficient, but on a prediction of what jurors would be likely to do. *Schlup*, 513 U.S. at 330. When, as here, the new evidence proffered by the defendant "call[s] into question the credibility of witnesses presented at trial," *id.*, that conflict in the evidence does not mean that the *Schlup* standard has not been met; it simply means that "the habeas court may have to make some credibility assessments." *Id.* In other words, if, after conducting a hearing, the district court concludes that Lee's family members are credible regarding the alibi, then the court would have no choice but to conclude that no reasonable juror would have convicted Lee beyond a reasonable doubt in light of the new evidence. *See id.* at 327.

III. THE TRIAL COURT DENIED LEE DUE PROCESS, AND 28 U.S.C. § 2254(d) DOES NOT LIMIT HIS ACCESS TO HABEAS RELIEF.

The state contends that the federal courts are powerless to rectify the injustice done Lee in this case because the Missouri Court of Appeals, in an alternative holding, allegedly rejected

Lee's federal due process claim on the merits. That holding, the state argues, is "presumed correct" under 28 U.S.C. § 2254(d). Resp. Br. 10, 44. This contention is flawed for several reasons.

First, section 2254(d) does not confer a presumption of correctness on state-court adjudications of federal claims. The provision is simply a restriction on the availability of federal habeas relief. *(Terry) Williams v. Taylor*, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring). The section 2254(d) analysis is therefore premature at this stage.

Second, the Missouri Court of Appeals undertook no federal due process analysis whatsoever in rejecting Lee's direct appeal.[7] At most, the state appellate court considered a claim under state law that the trial court abused its discretion in denying a continuance. J.A. 128. In the absence of an adjudication of the merits of Lee's federal claim, the standards of section 2254(d)(1) do not apply.

Even if the state court's alternative holding were treated as a disposition of Lee's federal due process claim, the only merits issue that the Missouri Court of Appeals even arguably addressed was the question of prejudice. The state court *assumed* an abuse of discretion, but then found that Lee failed to establish prejudice. J.A. 128. This treatment of Lee's due process claim resulted in a decision that was "contrary to this Court's precedent," *Williams*, 529 U.S. at 405, because if the state court had actually found a violation of due process, then it would have been required, under this Court's cases, to have determined whether this constitutional error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). *See Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (remanding for a harmless-error analysis after finding

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[7] In arguing that "because the Missouri Court of Appeals made no plain statement to the contrary, it should be presumed that the court was performing a federal law analysis," Resp. Br. 44, the state contradicts its earlier position that Lee did not present his federal due process claim to that court. Resp. Br. 16 n.2, 32 n.7. The state cannot have it both ways.

a violation of the right to present a defense); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (applying a *Chapman* harmless-error analysis to a Confrontation Clause violation).[8] Indeed, the consequences of such a due process violation are so dire for the defendant that in cases involving a denial of the right to present a defense, this Court has reversed without even discussing harmless error. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). That the Missouri Court of Appeals applied a heightened standard of prejudice, *see* J.A. 128 ("[A]ppellant has the burden of showing that the testimony of the absent witnesses was so crucial that it is reasonably probable a different outcome would have resulted."), one that "contradicts the governing law set forth" in this Court's cases, *Williams*, 529 U.S. at 405, only reinforces the conclusion that the state court did not, in fact, adjudicate a federal due process claim.

* * *

As a result of the trial court's arbitrary denial of a brief continuance here, a man who has protested his innocence from the beginning has been left to languish for the rest of his life in prison. If federal habeas corpus has "retain[ed] the 'ability to cut through barriers of form and procedural mazes,'" *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973) (quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)), then there can be no doubt but that Lee is entitled to a new trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the court of appeals.

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[8] The state is wrong to suggest that the *Brady/Strickland* formulation of prejudice generally applies to *preserved* due process claims on direct review. Resp. Br. 40. A *Brady* claim is a particular species of due process violation in which the materiality of the withheld exculpatory evidence is a required element of the violation itself.

Respectfully submitted,

Bonnie I. Robin-Vergeer
Counsel of Record
David C. Vladeck
Alan B. Morrison
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner Remon Lee

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